Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of SBC Communications Inc.,	)	
Michigan Bell Telephone Company, and	)	WC Docket No. 03-138
Southwestern Bell Communications	)	
Services, Inc. for Provision of In-Region,	)	
InterLATA Services in Michigan	)	

To: The Commission

OPPOSITION OF
NATIONAL ALEC ASSOCIATION/
PREPAID COMMUNICATIONS ASSOCIATION

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July 2, 2003

Summary

The Commission should deny the application of SBC Communications, Inc. *et al.* (collectively, "SBC") to provide in-region, interLATA services in Michigan. SBC has failed to demonstrate that it has fully complied with the 14-point competitive checklist. SBC adheres to and enforces policies that lead to the unreasonable and discriminatory provision of unbundled network elements, operator services/directory assistance, and resale services.

Specifically, SBC's: 1) call blocking policy removes the incentive for SBC to enforce service blocks and contributes to billing disputes; 2) deposit requirements are excessively onerous and overly broad; 3) escrow policy and inefficient dispute resolution process financially harm competitive local exchange carriers ("CLECs"); 4) monthly, flat-rate operations support systems charge imposes a substantial financial burden on smaller CLECs and new entrants; and 5) mandatory call branding fee imposes unnecessary costs on CLECs who would otherwise not custom brand operator or directory assistance services.

Taken as a whole, SBC's unreasonable, discriminatory, and anticompetitive policies evidence SBC's continued ability to wield monopoly power to the detriment of its competitors, many of whom still rely on SBC facilities for the provision of services to end users. SBC's unwillingness to modify such policies and ability to ignore requests by CLECs to do so raise serious doubts about whether local markets are truly open to competition and suggest that the public interest would not be served by grant of SBC's application unless such approval were appropriately conditioned, as discussed herein.

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COMMENTS OF
NATIONAL ALEC ASSOCIATION/ PREPAID COMMUNICATIONS ASSOCIATION

The National ALEC Association/Prepaid Communications Association ("NALA") hereby files these comments regarding the above-captioned application of SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (collectively, "SBC") to provide in-region, interLATA services in the State of Michigan. SBC has not demonstrated that it has complied with items 2, 7 and 14 of the competitive checklist or that the requested authorization is consistent with the public interest, convenience and necessity. Accordingly, the Commission should deny the application.

I. INTRODUCTION

National ALEC Association/Prepaid Communications Association. NALA is a trade association comprised of companies that since 1996 have been providing local telephone service to hundreds of thousands of residential consumers nationwide through the lease of unbundled network elements and by reselling the flat-rate local telephone services and custom calling features of incumbent local exchange carriers ("ILECs").[1] NALA members' core customers are

[1] In addition to service providers, NALA members include a wide range of companies that support the competitive local services industry.

those that historically have been considered high-risk – due, for example, to a poor credit history or lack of sufficient identification – and, thus, unable to obtain local telephone service from ILECs. NALA members typically offer these consumers a fixed-rate local service option that restricts the customer's access to long-distance and other usage-based services. As a group, NALA members provide services in all thirteen jurisdictions, including Michigan, in which SBC is an ILEC.

NALA members have been in negotiations with SBC regarding modifications to its generic interconnection agreement, the SBC-13 State Agreement, which SBC makes available throughout its service territory.[2] Through these negotiations and other efforts, NALA members have sought changes in certain of SBC's current policies, which are unreasonable, discriminatory, and anticompetitive. Unfortunately, these efforts have largely been in vain, as SBC has stubbornly refused to deviate from these policies. NALA's comments demonstrate that SBC continues to wield monopoly power to the detriment of its competitors and that SBC fails to provide services to NALA members and other CLECs in a reasonable and nondiscriminatory manner, as required for approval of its 271 application.

II. SBC FAILS TO SATISFY COMPETITIVE CHECKLIST ITEMS 2 AND 14

To satisfy items 2 and 14 of the competitive checklist, SBC must demonstrate that it is providing reasonable and nondiscriminatory access to unbundled network elements ("UNE") and to resale services in accordance with sections 251(c)(3) and 252(d)(1), and 251(c)(4) and 252(d)(3) of the Communications Act, respectively.[3] As part of this requirement, SBC is also

[2] SBC-13 State Agreement is available online at https://clec.sbc.com/clec/shell.cfm?section=66.

[3] *See* 47 U.S.C. § 271(c)(2)(B)(ii) and (xiv); *see also In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, at ¶ 131 (1997).

required to demonstrate that it accurately bills CLECs and that it has procedures in place to resolve billing disputes. In fact, SBC previously withdrew its application in April 2003 because of its inability to satisfy Commission concerns regarding, *inter alia*, billing functions.[4]

In its latest filing, SBC asserts that it has demonstrated that its processes and procedures result in accurate wholesale bills and are adequate to resolve any billing disputes that arise.[5] SBC dismisses the many CLEC comments contesting the accuracy of SBC's billing and its dispute resolution process with the claim that these "disputes ... inevitably arise ... [and are] not a result of systemic billing failures."[6] Instead, SBC attributes the cause of the disagreements, *inter alia*, to "disputes over the proper interpretation of the terms of the interconnection agreements."[7] SBC is partly correct - billing disputes inevitably arise because SBC systemically interprets the terms of the interconnection agreements in a manner that unfairly prejudices CLECs. As discussed below, the SBC policies underlying its contractual interpretations are unreasonable, discriminatory, and anticompetitive and, thus, SBC cannot satisfy the requirements of the competitive checklist.

A. SBC'S CALL BLOCKING POLICY IS INEFFICIENT AND CONTRIBUTES TO BILLING DISPUTES

NALA members generally subscribe to blocking services from SBC to restrict end-user access to usage-based services, such as collect calls, third party calls, and 1-700, 1-900, and 1-

[4] *See* Statement of FCC Chairman Michael Powell on Withdrawal of SBC's 271 Application for Michigan (April 16, 2003) ("[Q]uestions remain regarding whether SBC is currently providing wholesale billing functions for competitive LECs in a manner that meets the requirements of ... existing precedent."); *see also* Supplemental Brief In Support of Application by SBC for Provision of In-Region, InterLATA Services in Michigan, at 3 (June 19, 2003) ("SBC Supplemental Brief").

[5] SBC Supplemental Brief, at 21.

[6] *Id*.

976 calls.[8] SBC, however, expressly disclaims responsibility for the effectiveness of its blocks and requires CLECs to pay for usage-based services that inexplicably bypass the service block.[9]

SBC's policy is both unreasonable and discriminatory. Without financial accountability, there is little incentive for SBC to enforce or improve service blocks. The result is an increase in billing disputes as CLECs contest charges for usage-based services that should not have been provided to end users. As an example, one NALA member is currently in dispute with SBC in Michigan regarding more than $100,000 in charges for usage-based services that SBC, either negligently or intentionally, permitted to bypass the SBC blocks. Such a result particularly harms NALA members whose business plans are heavily dependent on predictable (fixed) monthly service charges and no (or little) usage-based charges.

It is worth noting that if these usage-based services were provided by a third-party carrier to NALA members' customers, the third party would either collect the charges directly from the end users or have a billing and collection agreement with the NALA member. In order to collect the charges directly, the third-party carrier would request the end users' billing name and address from the NALA member, which would provide it for a small fee. If the member and third-party carrier had a billing and collection agreement, the member, again, for a fee would bill the usage-based charges on behalf of the third-party carrier. In either case, the NALA member would be compensated and the risk of loss for nonpayment would remain with the third-party carrier.

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[7] *Id*.

[8] By blocking or limiting access to such calls, NALA members are able to charge customers a fixed fee service for basic, local phone service. Blocking services assist in eliminating usage-based services that customers either do not want or are not able to pay for, and thus, reduce suspensions or disconnections of service due to end-user nonpayment.

[9] *See, e.g.*, SBC-13 State Agreement, Appendix Resale, at § 8.8 ("CLEC ... accepts all responsibility for any charges ... associated with calls that bypass blocking systems.").

In stark contrast, NALA members receive no compensation from SBC and are forced to assume the risk of nonpayment. In many cases, the charges are not paid, resulting in more "at-risk" customers losing basic telephone service. Moreover, SBC assesses NALA members retail (not wholesale) rates for the types of calls in dispute, which results in higher costs to end-user customers.

B. SBC'S DEPOSIT REQUIREMENTS ARE EXCESSIVELY ONEROUS AND OVERLY BROAD

Under the SBC-13 State Agreement, SBC may demand that a CLEC provide a deposit of up to three months of charges if, *inter alia*: 1) in SBC's reasonable judgment, "there has been an impairment of the established credit, financial health or credit worthiness of CLEC;" 2) the CLEC fails to pay a bill on time; or 3) the CLEC has not already established satisfactory credit by having made at least twelve consecutive months of timely payments.[10] As the Commission concluded in the context of a recent proceeding regarding deposit requirements for access services, such deposit requirements are unnecessary, potentially discriminatory, and accordingly, impermissible.

In that proceeding, the Commission addressed the requests by several ILECs, including SBC, to modify their access services deposit requirements ostensibly to ensure that they would be financially protected in the event of a financial collapse of any of their CLEC access customers.[11] The Commission concluded that the expressed financial concerns were exaggerated

[10] *See* SBC-13 State Agreement, General Terms and Conditions, § 7.2.

[11] *See In the Matter of Verizon Petition for Emergency Declaratory and Other Relief, Policy Statement*, FCC 02-337, at ¶ 2 (2002).

and that the proposed deposit requirements were unnecessary and not narrowly tailored to target those customers who pose a genuine risk.[12]

The Commission expressly rejected deposit requirements which proposed to grant an ILEC considerable discretion in imposing a deposit because such requirements were too broadly worded and could be used to disadvantage competitors.[13] The Commission also concluded that deposits were appropriate only for customers with no credit history or a history of late payments, which the Commission defined as a "failure to pay the undisputed amount of a monthly bill in any two of the most recent twelve months, provided that both the past due period and the amount of the delinquent payment are more than *de minimus*."[14] Moreover, the Commission expressly rejected SBC's proposal for a two-month deposit requirement.[15]

In contrast, under the SBC-13 State Agreement, SBC requires a three-month deposit. Further, SBC's requirements for the establishment for good credit history grant considerable discretion to SBC, have no *de minimus* time or amount exceptions, and provide no leniency for any delinquent payment made during a 12-month period.[16] As the Commission has acknowledged, onerous deposit requirements of the type found in the SBC-13 State Agreement

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[12] *Id*. at ¶ 22.

[13] *Id*. at ¶ 21 ("Broad, subjective triggers that permit the incumbent LEC considerable discretion in making [deposit] demands, such as a decrease in 'credit worthiness' or 'commercial worthiness' falling below an 'acceptable level,' are particularly susceptible to discriminatory application.").

[14] *Id*. at ¶ 26.

[15] *Id*. at ¶¶ 12,14.

[16] In addition to requesting that SBC conform its deposit requirements to Commission established norms, one NALA member also unsuccessfully suggested in negotiations that a CLEC should not be required to reestablish good credit standing in one state once it establishes credit with an SBC affiliate in another state and that SBC should not be permitted to increase deposit requirements once a CLEC establishes good credit merely because the CLEC's level of business has increased.

substantially burden CLECs by depleting the capital "needed to fund current business operations and planned future expansions."[17]

C. SBC'S ESCROW POLICY AND INEFFICIENT DISPUTE RESOLUTION PROCESS FINANCIALLY HARM CLECS

SBC requires that all disputed amounts be placed into escrow.[18] While such a requirement, in and of itself, may not appear to be unreasonable or discriminatory, it becomes so when coupled with SBC's inefficient dispute resolution process and policies that foster disputed charges (i.e. toll calls that bypass service blocks).[19] Disputed charges often linger for months, and in some cases years without resolution, tying up the working capital of CLECs and lessening their ability to expand service offerings. For example, the call-blocking dispute between one NALA member and SBC has been unresolved for more than 18 months.

In an effort to reduce the anticompetitive consequences of the escrow requirement and provide incentives for SBC to resolve disputes expeditiously, a NALA member proposed that SBC permit CLECs to reduce the total amount of money to be placed into escrow for billing disputes by amounts already in escrow more than 60 days. Although such a policy strikes a reasonable balance in protecting both parties' interest, SBC rejected the proposal.

D. SBC'S MONTHLY, FLAT-RATE CHARGE FOR ACCESS TO OPERATIONS SUPPORT SYSTEMS IS UNSUPPORTABLE AND ANTICOMPETITIVE

SBC requires CLECs to pay a flat-rate charge of approximately $3,200 per month per state for access to Operations Support Systems ("OSS") in Arkansas, Kansas, Missouri,

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[17] *Id*. at ¶¶ 23-25.

[18] *See* SBC-13 State Agreement, General Terms and Conditions, at § 9.3.

[19] *See also* Opposition of Z-Tel Communications, Inc., WC Docket No. 03-16 (February 6, 2003) (providing evidence of SBC's inaccurate billing); Complaint of Sage Telecom, Inc., MPSC Case

Oklahoma, and Texas.[20] While the flat-rate, OSS charges currently apply only to these five states, SBC could assess a similar flat-rate charge in other states including Michigan.[21]

The flat-rate, monthly OSS charge is anticompetitive and discriminatory because it discourages new entrants in these markets and raises operating costs of smaller CLECs, who have to spread the additional yearly base costs of approximately $38,400 (or $192,000 for CLECs operating in all five states) possibly over only a few hundred or a few thousand customers.[22] In fact, recognizing this anticompetitive consequence, the Commission in the context of the merger of the former SBC and Ameritech Corp. required that the merged firm "restructure its OSS charges to eliminate any flat-rate, up-front charge for the right to use the company's standard electronic interfaces for accessing OSS."[23] While that merger condition expired in October of 2002, the competitive justification for a usage-based charge remains.

SBC has not demonstrated why it is necessary to impose a flat-rate fee. No other major ILEC, to NALA's knowledge, charges a flat-rate fee for access to OSS. Additionally, the usage-based fees SBC currently assesses in other states, and previously in the five states in which it now imposes a flat-rate fee, appear to permit adequate recovery of SBC's OSS costs.

No. U-13747 (March 26, 2003), available at http://efile.mpsc.cis.state.mi.us/efile/docs/13747/0001.pdf.

[20] Attached as Exhibit A is a letter to SBC from NALA regarding this issue. *See also* SBC-13 State Agreement, Appendix OSS, at §12, and TX Pricing Schedule. There is also a separate "Direct Connectivity" charge of approximately $1,500 per month per port or an alternative "Dial-Up Connectivity" charge of $300 per month per port.

[21] *See, e.g., Ameritech Corp. Transferor, and SBC Communications, Inc., Transferee For Consent to Transfer Control*, 14 FCC Rcd 14712, at ¶ 384 (1999) (acknowledging that SBC could spread the flat-rate fee to other states).

[22] *See id.*; *see also In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, at ¶ 395 (1997).

[23] *Id*.

III. SBC FAILS TO SATISFY CHECKLIST ITEM 7

The Commission requires that ILECs, such as SBC, provide CLECs the opportunity to brand operator services and directory assistance ("OS/DA") services to their end users.[24] According to SBC, "OS/DA services are available to facilities-based carriers ... at TELRIC rates as required by the MPSC."[25] In fact, SBC requires that "facilities-based" providers, including CLECs providing services through UNE-Platform ("UNE-P"), brand (or unbrand) OS/DA services and pay the associated fees of approximately $4,000 per switch.[26]

SBC's requirement is contrary to Commission policy. Commission precedent makes clear that CLEC-specific branding is a requirement on ILECs to provide CLECs the option of branding, not a requirement that CLECs pay ILECs branding fees.[27]

The mandatory branding fee is anticompetitive and discriminatory. It essentially forces CLECs to purchase CLEC-specific branding regardless of their preference. For most NALA members, who discourage or prohibit end-users from accessing usage-sensitive OS/DA services,

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[24] *See* 47 C.F.R. § 51.217(d).

[25] *See* Brief in Support of Application by SBC for Provision of In-Region, InterLATA Services in Michigan, WC No. 03-16, at 79 (January 16, 2003) ("SBC Brief").

[26] Attached as Exhibit B is a letter to SBC from a NALA member initiating formal dispute resolution regarding this matter. *See also* SBC-13 State Agreement, Appendix OS, at § 4 ("Where technically feasible and/or available SBC-13STATE will brand OS in CLEC's name.").

[27] *See, e.g., Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization To Provide In-Region*, *InterLATA Services in Nevada*, FCC 03-80, at ¶ 58 (2003) ("The Commission's rules require that BOCs to permit competitive LECs wishing to resell the BOCs operator services and directory assistance to request the BOC to brand their calls.") (emphasis added); *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization To Provide In-Region*, *InterLATA Services in California*, 17 FCC Rcd 25650, at ¶ 58 (2003); *see also In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, at ¶ 395 (substantial up-front fees "chill competition").

there is no business justification for having branded OS/DA services, and SBC's policy only imposes unnecessary costs.

Industry practice suggests that there is no cost justification for an ILEC's imposition of a mandatory branding fee.[28] For example, BellSouth offers in its standard interconnection agreement custom branding, BellSouth branding, or unbranding for OS/DA services. For CLECs providing service through UNE-P or resale, BellSouth branding is the default brand and is available at no additional charge to CLECs. Such a result is not surprising given that BellSouth incurs no additional costs to provide default branding. Because SBC, like BellSouth, already has specific branded messages and need only associate such messages with the appropriate CLEC Operating Company Number, there is no cost justification for SBC's assessment of custom branding charges for CLECs electing default SBC branding.

Oddly, SBC has taken the position that resellers are not required to brand OS/DA services, although the applicable contract language governing branding of resale OS/DA services essentially parallels the language in the UNE OS/DA branding provisions.[29] While NALA does not oppose SBC in this regard, NALA notes that SBC's policies are internally inconsistent. The provision of OS/DA services to end-user customers is essentially identical, whether a UNE-P provider or a reseller serves that customer. In both instances, an OS/DA call by an end-user follows the same routing and terminates at SBC's OS/DA services.[30] Accordingly, there is no

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[28] *See, e.g.,* BellSouth Standard Interconnection Agreement, Attachment 1 - Resale § 8.4 and Exhibit E, Attachment 2 - UNE § 10.4 and Exhibit B, available at http://www.interconnection.bellsouth.com/become_a_clec/docs/ics_agreement.pdf; QWEST Statement of Generally Available Terms and Conditions, §10.5 and Exhibit A, available at http://www.qwest.com/wholesale/clecs/negotiations.html.

[29] *See* SBC-13 State Agreement, Appendix Resale, at § 4.11.

[30] *See, e.g.,* SBC Brief, at 79.

logical reason why SBC's assessment of branding charges for OS/DA services provisioned through UNE-P or through resale should be any different, and the disparate treatment suggests that there is no genuine reason for mandatory branding.

IV. APPROVAL OF SBC'S APPLICATION IS CONTRARY TO THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY

In addition to finding compliance with the competitive checklist, the Commission must separately conclude that SBC's requested authority is consistent with the public interest, convenience and necessity.[31] Considered as a whole, SBC's unreasonable, discriminatory, and anticompetitive policies demonstrate that SBC continues to wield monopoly power to the detriment of its competitors, many of whom still rely on SBC facilities for the provision of services to end users. SBC's unwillingness to modify its policies and ability to ignore requests by CLECs to do so raise serious doubts about whether local market are truly open to competition and suggest that the public interest would not be served by grant of SBC's application.

NALA recognizes that in theory many of the identified issues could be resolved through interconnection agreement negotiations. However, SBC has refused to show any flexibility on these issues. While NALA members could arbitrate, the time and expense to do so in each of the SBC states is prohibitive and could lead to disparate results. Accordingly, if the Commission approves the 271 application, it should condition such approval on SBC modifying its policies throughout its service territory consistent with the NALA positions stated herein. Such an order would significantly bolster the viability of competitors in the SBC states and encourage new

[31] *See* 47 U.S.C. § 271(d)(3)(C).

entrants in these markets. Otherwise, smaller CLECs will eventually exit these markets with consumers left as the ultimate losers.

Conclusion

For the reasons stated above, NALA requests that the Commission deny SBC's application to provide in-region, interLATA services in Michigan.

Respectfully submitted,

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July 2, 2003

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I hereby certify that a true and correct copy of the foregoing Opposition was sent by electronic mail or hand delivery (*) on July 2, 2003 to the following:

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EXHIBIT A

EXHIBIT B